

*United States Court of Appeals  
for the Second Circuit*



**APPENDIX**



75-7634

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IN THE  
**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

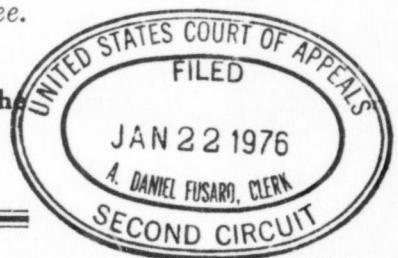
JOAQUIM CONCEICAO,  
*Plaintiff-Appellant,*  
—against—

NEW JERSEY EXPORT MARINE CARPENTERS,  
INC.,  
*Defendant-Third Party Appellee,*  
—and—

CIA DE NAV. MAR NETUMAR,  
*Third Party Defendant-Appellee,*  
—against—

INTERNATIONAL TERMINAL OPERATING  
COMPANY, INC.,  
*Third Party Defendant-Appellee.*

On Appeal from the United States District Court for the  
Southern District of New York



**APPENDIX TO APPELLANT'S BRIEF**

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BAKER, GARBER, DUFFY & BAKER  
A Professional Corporation  
*Attorneys for Plaintiff-Appellant*  
1 Newark Street,  
Hoboken, New Jersey 07030  
(212) 227-5748

and

c/o HELWEIL and CRISPINO, Esqs.  
79 Wall Street  
New York, New York 10005

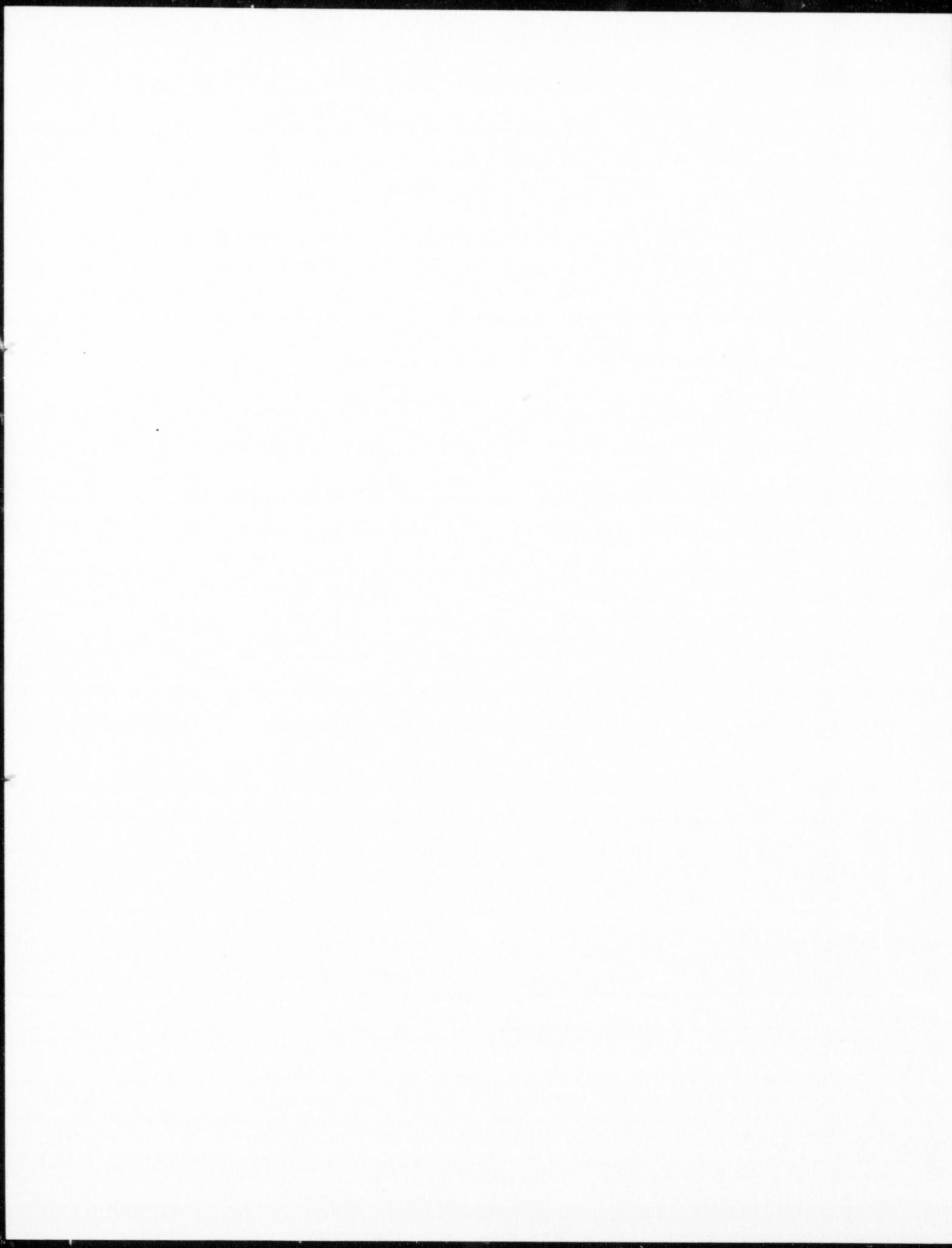
GEORGE J. DUFFY  
*Of Counsel*

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## DOCKET ENTRIES

DATE	PROCEEDINGS	Date of Judgment
Jun 8-71	Filed Complaint. Issued Summons.	
12-71	Issued additional summons.	
17-71	Issued 2 additional summons.	
Aug 17-71	Filed summons with marshal's ret. Served New Jersey Export Marine Carpenters, Inc. on 6/22/71.	
	Served Cia De Nav. Mar. Netumar Net served.	
Aug 17-71	Filed additional summons with marshal's ret. Served Mr. Daniel J. Devaney, Pres. by Mrs. Devaney, wife, on 7/12/71.	
Aug 17-71	Filed additional summons with marshal's ret. Served William L. Morris, Registered Agent, by Mrs. W. L. Morris on 7/15/71.	
Aug 17-71	Filed additional summons with marshal's ret. Served: Secretary of State, State of New York by David E. Bronnean on 7/8/71. Cia De Nav. Mar. Netumar by Mr. Marasco on 7/7/71.	
Aug 25-71	Filed pltff's Interrogs to deft. New Jersey Export Marine Carpentry.	
Aug 25-71	Filed pltff's Request To Produce	
Aug 25-71	Filed pltff's interrogs. to deft. Cia De Nav. Mar. Netumar	
Aug 25-71	Filed pltff's Request To Produce	
Sept 9-71	Filed Notice of taking Depositions of New Jersey Export Marine Carpenters, Inc. by its officer or managing agent, and also by the Foreman, etc.	
Sept 9-71	Filed Notice of taking Deposition of deft. Cia de Nav. Mar. Netumar.	
Sept 16-71	Filed deft. Third Party Complaint and issued summons	
Sept 22-71	Filed ANSWER of New Jersey Export Marine Carpenters, Inc. to complaint, and demand C&D for Interrogatories.	C&D
Sept 27-71	Filed Notice of taking Deposition of Plaintiff.	
Oct 8-71	Filed Interrogatories to 3rd pty. deft. International Term.	
Oct 9-71	Filed Summons with Marshal's ret. Served: International Terminal Operating Co., Inc. by Mr. Nolan on 10-4-71	
Oct 11-71	Filed third party defendant's ANSWER to 3rd pty. complaint, cross-complaint and counterclaims, and jury demand.	JDC
Oct 3-71	Filed ANSWER of deft-3rd pty. pltff. to 3rd pty. counterclaim.	
Oct 2-72	Filed Third pty answers to Interrogs.	
Oct 17-72	Filed ANSWER to cross claim by deft. and 3rd party pltff. Cia De G&C Nav. Mar. Netumar, addressed to 3rd party deft. International	G&C
Oct 17-72	Filed deft. and 3rd party pltff. Cia De Nav. Mar. Netumar, Third Party Complaint	
Oct 17-72	Filed deft. and 3rd party pltff. ANSWER and Cross Claim, to complaint	C&C
Oct 22-72	Filed deft. and 3rd party pltff. Cia. De Nav. Mar. Netumar, Interrogs. addressed tp pltff.	
Oct 22-72	Filed deft. and 3rd party pltff. Cia. De. Nav. Mar. Netumar, Interrogs. addressed to deft. and 3rd party pltff. N.J. Export Marine	
Oct 22-72	Filed deft. and 3rd party pltff. Cia. De. Nav. Mar. Netumar, Interrogs. addressed to 3rd party deft.	
Oct 28-72	Filed deft. and 3rd party pltff. Cia. De Nav. Mar. Netumar, Notice to take deposition of pltff. on 12-5-72.	
Oct 28-72	Filed pltff's affidavit by Robert L. Ellis, in opposition to pltff's motion pursuant to Rule 37(d), etc.	
Oct 7-72	Filed ANSWER of International Term. Operating Co. Inc. to 3rd pty. complaint.	JDC
Oct 4-72	Filed 3rd pty. summons with marshal's ret. Served International Term. Operating Co. Inc. by Mr. Nolan, V.P. on 11/21/72.	
Oct 11-72	Filed Notice of Motion Ret. 1/9/73 at 10 AM by New Jersey Export Marine Carpenters, Inc. re: dismiss	L&C
Oct 11-72	Filed Memorandum of Law in support of deft's motion to dismiss.	
Oct 10-72	Filed Notice of Deposition of plaintiff.	

continued next page

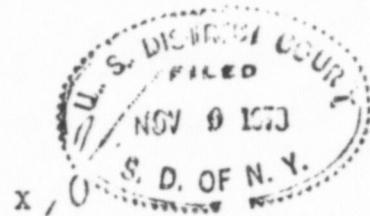
DATE	PROCEEDINGS	DATE Ord Judgment
Dec. 18-72	Filed Interrogatories.	
Dec. 18-72	Filed Answer of deft-3rd pty. pltff. New Jersey Export Marine Carpenters, Inc. to cross-complaint of deft. Companhia de navegacao Maritima, Netumar.	
Dec. 18-72	Filed Notice of Deposition of Cia De Nav. Mar Netumar. by a first mate, etc.	
Jan 4.73	Filed Affidavit in opposition to motion by dft. & 3rd party pltff. on Interrogs.	
Jan 11.73	Filed Summons & marshals ret. Served Hudson Cement Corp. on 1/2/73.	
Jan 12.73	Filed Pltffs. Notice of taking deposition upon dft. & 3rd pty pltff. Cia De Nav Mar Netumar.	
Jan 12.73	Filed Pltffs. Supplementary request to produce of Dft. & third pty pltff. Cia De Nav Mar Netumar.	
Jan 12.73	Filed Pltffs. Supplementary request to produce of 3rd Dft. & third pty pltff. New Jersey Export Marine Carpenters Inc.	
Feb 13.73	Filed Memo. End. on motion paper dated 12/11/72. Dft. & 3rd pty pltff. motion for an order dismissing the pltffs. complaint, etc. is granted. In the event that pltff. fails to answer interrogs. dft & 3rd pty pltff. may settle an order on notice dismissing pltffs complaint, etc. So Ordered Ward J. (M/N)	
Mar 2.73	Filed Order Ordered Dft. N.J. Export Marine Carpenters, Inc. shall serve within 10 Days answers to pltff's interrogs. on or before 4/10/73. Also for Dft. CIA DE NAV, MAR, NETUMAR. ETC. Ward J.	
Mar 4.73	Filed Dft. Cia De Nav. Mar Netumar's Answers to Pltffs. Interrogs.	
Mar 5.73	Filed Answers to Interrogs. of Dft. & 3rd Pvt Pltff. Cia De Nav Mar Netumar by Pltff.	
Mar 5.73	Filed Answers to Interrogs of Dft. & 3rd pty Pltff. N.J. Export Marine Carpenters Inc. by Pltff.	
Mar 12.73	Filed Answers to Interrogs. by Dft. N.J. Export Marine Carpenters Inc.	
Mar 13.73	Filed Notice of Motion by pltff. Re. Answer Interrogs. ret. 5/11/73.	
Mar 13.73	Filed Memorandum in support of pltffs. motion to compel dft. N.J. Export Marine Carpenters, Inc. to give full & Specific Answers to Interrogs.	
Apr 17.73	Filed Affidavit in opposition by John J. Wrenn	
Apr. 25.73	Filed 3rd pty Dft. Answers to 3rd pty pltff. Interrogs.	
Apr. 27.73	Filed 3rd pty Dft. Answers to Interrogs. to to 3rd pty pltff. Netumar.	
May 11.73	Filed Memo. End. on motion dated 4/13/73. Motion granted as indicated. Ward J.	
May 21.73	Filed Answers to Interrogs. by N.J. Export Marine Carpenters to pltffs. interrogs.	
Jun 11.73	Filed Pre Trial Memorandum of 3rd pty dft.	
Jun 21.73	Filed Pltffs. Pre Trial Order. Ward J.	
Oct. 25.73	Filed Trial Memorandum. & 3rd pty pltff. Netumar.	
Oct. 25.73	Filed Requests to charge of deft. & 3rd pty pltff. Netumar.	
Oct 26-73	Pltffs. Trial Begun	
Oct 30-73	Pltffs. Trial continues	
Nov 1.73	"	
Nov. 5.73	Before Judge Ward 10/29/73 Trial begun & continued 10/30/73, 11/1/73, 11/2/73 to 11/5/73 Jury deliberating Verdict attached 10 days for motions, 5 days to reply.	
Nov. 9.73	Filed Judgment #73-389. Ordered that pltff. have judgment against deft. Cia De Mar. Netumar in the amnt of \$42,000.00., & that the complaint against the deft. N.J. Export Marine Carpenters Inc., & that the 3rd pty complaint against 3rd pty deft. be and they are dismissed. Clerk. Approved Ward J. (mailed notice)	
Nov. 20.73	Filed Pltffs. Memorandum in opposition to motion by Deft. Netumar, for Judgment N.O.V. on the jury's verdict of negligence, etc.	
Nov. 20.73	Filed Affidavit in opposition to motion by Deft. Netumar for Judgment N.O.V. on the jury's verdict of negligence, etc. by George J. Duffy.	

DATE	PROCEEDINGS	Date Judge
Nov. 26.73	Filed Affidavit in opposition by Albert V. Testa to deft. & 3rd pty pltff. Cia De Nav. Mar. Netumar motion.	
Dec. 25.73	Filed 3rd Pty Deft. memorandum of law in opposition to the 3rd pty pltff's. motion for a judgment N.O.V.	
Nov. 26.73	Filed Affidavit in opposition by John J. Wrenn to the ship's motion.	
Nov. 28.73	Filed Affidavit by Victor S. Cichanowicz in opposition to deft. Netumar for judgment notwithstanding the verdict.	
Nov. 30.73	Filed Excerpt of Charge to the Court, dated 11/5/73. Judge & Jury.	
Dec. 10.73	Filed Memo. End. on motion dated 11/15/73 by deft. & 3rd pty pltff. Netumar. Motion denied in accordance with memorandum decision. Ward J.	
Dec. 10.73	Filed Pltff's Trial Memorandum of Law.	
Dec. 10.73	Filed Pltff's request to charge.	
Dec. 10.73	Filed Deft. & 3rd pty pltff. N.J. Export Marine Carpenters Inc. Requests to charge.	
Dec. 10.73	Filed 3rd pty defts. request to charge. I.I.O.	
Dec. 10.73	Filed 3rd pty defts additional requests to charge.	
Dec. 10.73	Filed Memorandum Decision. The shipowners motion for judgment notwithstanding the verdict or in the alternative for a new trial, is in all respects denied. Ward J. (mailed notice)	
Dec. 11.73	Filed Examination before trial of deft. & 3rd pty pltff. New Jersey Export Marine Carpenters Inc. by William Montella dated 1/9/72. (mailed notice)	
Dec. 11.73	Filed Examination before trial of deft. & 3rd pty pltff. Cia De Nav. Mar. Netumar by Richard A. Piper on 3/20/73. (mailed notice)	
Jan. 3.74	Filed Bill of Costs in the amount of \$427.32 against deft.. No appearance in opposition. Clerk.	
Jan. 8.74	Filed Notice of Appeal from judgment dated 11/7/73. (deft. & 3rd pty pltff) (mailed notice)	
Jan. 11.74	Filed Pltffs. Notice of Protective Cross Appeal of judgment filed 11/9/73. (mailed notice)	
1-10-74	Transcript of proceedings dated 11-2-73	
Feb. 14.74	Filed 3rd pty's order that the time for deft. Cia De Nav. etc. & pltff. to transmitt the record to the USCA is extended to 3/15/74. Ward J.	
Mar. 7.74	Filed transcript of proceedings dated Oct 29, 30, 1973 & Nov 1, 2, 5, 1974	
Mar. 7-74	Filed memo. of law submitted on behalf of the deft and 3rd party plaintiff.	
Nov. 15.73*	Filed notice of motion and affidavit re: Rule 50(b) by deft.	
1-12-74	Transcript of proceedings dated 11-2-73	
1-12-74	Filed 3rd pty's exhibits to the Trans. to USCA	
1-8-74	Filed transcript of record of proceedings. dated 10-29-73 10-30-73 11-2-73 11-5-73	
May. 6.75	Filed 3rd pty Pltffs. Notice of Motion & supporting affidavit, for an order directing the deposit with the Court of the judgment, interest & costs. rec. 5/20/75.	
May. 6.75	Filed 3rd pty Pltffs. Memorandum of Law.	
05-15-75	Filed Pltff's. affidavit in opposition to Deft. & 3rd Pty Pltff's. (Netumar) motion to deposit funds and cross motion to invalidate 3rd Pty Deft's. claim for reimbursement out of judgment recovered by Pltff.	
05-21-75	Filed Pltff's. memorandum of law in support of cross motion against 3rd Pty Deft.	
05-27-75	Filed Deft's. & 3rd Pty Pltff's. (Netumar) affidavit in reply and in support of cross-motion or motion to amend.	
05-27-75	Filed true copy of U.S.C.A. mandate with Opinion attached-The judgment of the District Court is affirmed with costs to be taxed against the deft. and 3rd Pty Pltff. - appellant Cia De Nav. Mar Netumar. Docket as Judgment #75,468 on 5-28-75. (mailed notice)	
06-02-75	Filed Pltff's. reply affidavit in opposition to Deft., Netumar's motion to amend judgment.	

(Continued)

DATE	PROCEEDINGS	Date Ord Judgment
8-15-75	Filed True Copy of USCA Mandate with opinion attached. Ordered that the said judgment of the said district court is affirmed with costs to be taxed against the deft. & 3rd pty pltff. appellant Cia De Nav. Mar Netumar. Docketed as A Judgment #75,734 on 9-8-75 Judgment Entered 8-18-75 Clerk: Entered 9-9-75 (mailed notice)	
1-26-75	Filed 3rd Pty Defts. Memorandum of law in opposition to the defts. motion & the pltffs. cross motion.	
1-10-75	Filed memo. end. on motion dtd. 5-6-75. Motion granted in accordance with memorandum decision filed herewith. Ward J. (mailed notice)	
2-10-75	Filed Memorandum Order: Accordingly, the employer, ITO, is entitled to reimbursement of its compensation payments from the pltffs. recovery. Conceicao's cross motion, asking that ITO'S claim be declared invalid, it consequently denied. Netumar's motion for an order directing the deposit with the Court of that portion of the judgment which it still retains is granted. Settle Order on notice. Ward J.	
1-10-75	Filed Memo. End. on motion dtd. 5-16-75. Motion denied in accordance with memorandum decision filed herewith. Ward J. (mailed notice)	
1-15-75	Filed Pltffs. affidavit and notice of motion for an order to Stay pending appeal. Ret. 10-21-75.	
2-11-75	Filed Affidavit in opposition by Paul Klein to pltff's. motion for stay.	
2-28-75	Filed Memo. End. on motion dtd. 10-15-75. Motion for stay pending appeal denied Ward J. (mailed notice)	
3-28-75	Filed Order that motion of 3rd Pty pltff. CIA De Nav. Mar. Netumar is granted; & the cross motion is denied; & 3rd Pcy pltff. deposit into the registry of this court within 5 days after service of this order with notice of its entry the sum of \$6,327.19, & that the sum be paid to Alexander, Ash Schwartz & Cohan, attys. for 3rd Pcy deft., etc. Ward J. (mailed notice)	
4-05-75	Filed Pltffs. Notice of Appeal from judgment dtd. 10-28-75. (mailed notice)	

## JUDGMENT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JOAQUIM CONCEICAO,

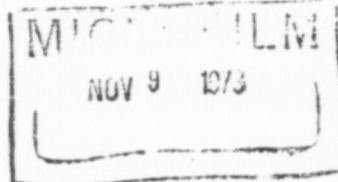
Plaintiff, : 71 Civil 2550(RJW)

-against-

NEW JERSEY EXPORT MARINE CARPENTERS  
INC. AND CIA DE NAV. MAR. NETUMAR,  
Defendants  
and Third-Party Plaintiffs,

# 73,887

-against-

INTERNATIONAL TERMINAL OPERATING CO.,  
INC.,  
Third-Party Defendant.

The issues in the above entitled action having been brought on regularly for trial before the Honorable Robert J. Ward, United States District Judge, and a jury on October 29, 30, November 1, 2 and 5, 1973, and the Court having submitted the attached special verdict to the jury, and the jury having answered the special verdict as indicated thereon, and the jury having returned the special verdict in favor of the plaintiff, it is,

ORDERED, ADJUDGED AND DECREED, that plaintiff, JOAQUIM CONCEICAO, have judgment against the defendant, CIA DE NAV. MAR. NETUMAR, in the amount of \$42,000.00, and it is further  
 ORDERED, that the third-party complaint against the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., be and is hereby dismissed.

Dated: New York, N. Y.

November 7, 1973

APPROVED:

Robert J. Ward  
United States District Judge

Raymond F. Baumgardner  
Clerk

## Judgment

At a Sated Term of the United States District Court  
for the Southern District of New York, held in the  
United States Court House in the Borough of Man-  
hattan, City of New York on the  
day of in the year of our Lord, One  
Thousand Nine Hundred and

PRESENT:  
HONORABLE:

*Robert J. Ward*  
United States District Judge.

Joaquim Conceicao  
-vs-  
New Jersey Export Marine Carpenters,  
Inc and Cia de Mar. Netumar  
Dept. o 3rd Ply. Ptg.  
-vs.  
International Terminal Operating  
Co. Inc.

Docket No. 71 Civ 2550

Now comes the Plaintiff By *Baker, Barber, Duffy & Baker, Esq. by  
George J. Duffy*

and moves the trial of this cause. Likewise comes the Defendant by *Harken, Meng & Murray, counsel  
John J. Brennan, Esq. by Oppola & D'Onofrio, Esq.  
V. J. Richardson, Esq. by Alexander, Schreyer & Cohen, Esq. by  
L. S. V. Tecta, Esq. by counsel*

20 1973 Whereupon a Jury is duly empaneled and sworn, and the cause proceeds to Trial.

20 1973 Trial begun

20 1973 " continues

1-123 " "

2-1273 " concluded, jury deliberating

4-5-1273 Jury deliberating, Verdict (attached)  
10 days for motions 5 days to reply

*Ursula Kruger*

*Judgment*

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x  
JOAQUIM CONCEICAO,

Plaintiff, :

-against- :

NEW JERSEY EXPCRT MARINE CARPENTERS  
INC. and CIA DE NAV. MAR. NETUMAR,

VERDICT

Defendants and  
Third Party Plaintiffs, : 71 Civ. 2550

-against- :

INTERNATIONAL TERMINAL OPERATING CO.  
INC., :

Third Party Defendant. :

-----x  
1. Has plaintiff established his claim that the  
defendant New Jersey Export Marine Carpenters Inc. was  
negligent and that its negligence was a proximate cause  
of plaintiff's accident? (Answer yes or no) NO

2. Has plaintiff established his claim that the  
defendant Cia de Nav. Mar. Netumar was negligent and that  
its negligence was a proximate cause of plaintiff's accident?  
(Answer yes or no) YES

3. Has plaintiff established his claim that the  
ship S.S. MOSQUEIRO was in an unseaworthy condition and that

*Judgment*

this unseaworthiness was a proximate cause of plaintiff's accident? (Answer yes or no) NO

4. Has plaintiff established his claim that the defendant New Jersey Export Marine Carpenters Inc. breached any warranty of workmanlike performance which it owed plaintiff and that this breach of warranty was a proximate cause of plaintiff's accident? (Answer yes or no) NO

5. If the answers to Questions 1 and 4 are "no", your verdict is for the defendant New Jersey Export Marine Carpenters Inc., and you should put an "X" here. X

6. If the answers to Questions 2 and 3 are "no", your verdict is for the defendant Cia de Nav. Mar. Netumar, and you should put an "X" here. \_\_\_\_\_

7. If the answer to Question 1, 2, 3 or 4 is "yes", what is the total dollar amount of damages to plaintiff?

\$ 402,000

8. In the event you have found above that the plaintiff is entitled to recover, do you find that the defendants have established their claims that plaintiff was himself negligent and that his negligence was a proximate cause of the accident? (Answer yes or no) NO

*Judgment*

9. If the answer to Question 8 is "yes", what percentage did plaintiff's fault so contribute? 0 %  
(If the answer to Question 8 is "no", do not answer this question.) If you entered a percentage on this question, fill in its equivalent dollar amount here. \$ 0

10. Subtract the dollar amount stated in Question 9 from the total amount of damages stated in Question 7 and enter here the difference, which will be the net amount of damages you find the plaintiff is entitled to recover:

Question 7 total \$	<u>42,000</u>
- Question 9 total \$	<u>0</u>
Net Recovery \$	<u>42,000</u>

A 108

*Judgment*

PLEASE ANSWER THE FOLLOWING QUESTIONS

11. Has defendant Cia de Nav. Mar. Netumar established its claim that International Terminal Operating Co., Inc. breached its warranty of workmanlike performance of the stevedoring operation and that this breach of warranty was a proximate cause of plaintiff's accident?

(Answer yes or no) YES

12. Did any conduct of defendant Cia de Nav. Mar. Netumar prevent the shipowner from recovering indemnity from International Terminal Operating Co., Inc.?

(Answer yes or no) NO YES

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT



74-1344

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of December one thousand nine hundred and seventy-four.

Present: HON. HAROLD R. MEDINA  
HON. HENRY J. FRIENDLY  
HON. MURRAY I. GURFEIN

Circuit Judges,

Joaquim Conceicao,  
Plaintiff-Appellee,  
v.  
New Jersey Export Marine Carpenters Inc.,  
and CIA De Nav. Mar Netumar,  
Defendants and Third Party  
Plaintiffs,  
CIA De Nav. Mar Netumar,  
Defendant and Third Party  
Plaintiff-Appellant,  
International Terminal Operating Co., Inc.,  
Third-Party Defendant,

74-1344

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the defendant and third-party plaintiff-appellant Cia De Nav. Mar Netumar.

A. DANIEL FUSARO,  
Clerk

By Vincent A. Carlucci  
Chief Deputy Clerk

A 128

SUPREME COURT OF THE UNITED STATES  
OFFICE OF THE CLERK  
WASHINGTON, D. C. 20540

April 28, 1975

Victor S. Cichanowicz, Esq.  
80 Broad Street  
New York, N.Y. 10004

RE: CIA de NAV. MAR. NETUMAR v. CONCEICAO,  
ET AL., 74-1146

Dear Sir:

The Court today entered the following order  
in the above-entitled case:

**The petition for a writ of certiorari  
is denied. Mr. Justice Douglas took no part  
in the consideration or decision of this peti-  
tion.**

cc: William F. Larkin, Esq.

Sidney A. Schwartz, Esq. Very truly yours,

Michael Rodak, Jr., Clerk  
By

*Helen Taylor*  
Helen Taylor (Mrs.)  
Assistant Clerk

✓-  
Nathan Baker, Esq.  
Baker, Garber, Duffy & Baker  
1 Newark St.  
Hoboken, N.J. 07030

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

JOAQUIM CONCEICAO, :  
Plaintiff, :  
-against- :  
NEW JERSEY EXPORT MARINE CARPENTERS, INC. : 71 Civ. 2550  
and CIA DE NAV. MAR. NETUMAR, : (RJW)  
Defendant and Third- : NOTICE OF  
Party Plaintiffs, : MOTION  
-against- :  
INTERNATIONAL TERMINAL OPERATING CO., :  
INC., :  
Third-Party Defendant .  
-----X

SIRS:

PLEASE TAKE NOTICE that upon the annexed affidavit of VICTOR S. CICHANOWICZ, duly sworn to on the 5th day of May, 1975, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court before the Honorable Robert J. Ward, at the Courthouse, Foley Square New York, New York, on the 20th day of May, 1975, at 2:30 o'clock in the afternoon, or as soon thereafter as counsel can be heard, for an order pursuant to Rule 67 of the Federal Rules of Civil Procedure, directing the deposit with the Court of the judgment, interest and costs, and for such other and further relief as to this Court may seem just and proper.

Dated: New York, New York  
May 5, 1975.

Yours etc.,

CICHANOWICZ & CALLAN

By: *Victor S. Cichanowicz*  
Attorneys for Defendant  
and Third-Party Plaintiff  
CIA DE NAV. MAR. NETUMAR,  
80 Broad Street  
New York, New York 10004

TO: BAKER, GARBER, DUFFY & BAKER, ESQS.  
Attorneys for Plaintiff  
1 Newark Street  
Hoboken, New Jersey 07030

LARKIN, WRENN & CUMISKY  
Of Counsel to COPOLLA & D'ONOFRIO, ESQS.  
Attorneys for Defendant and Third-Party Plaintiff,  
NEW JERSEY EXPORT MARINE CARPENTERS, INC.  
11 Park Place  
New York, New York 10007

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.  
Attorneys for Third-Party Defendant  
801 Second Avenue  
New York, New York

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

JOAQUIM CONCEICAO, :  
Plaintiff, :  
-against- : 71 Civ. 2550  
NEW JERSEY EXPORT MARINE CARPENTERS, INC. : (RJW)  
and CIA DE NAV. MAR. NETUMAR,  
Defendant and Third- : AFFIDAVIT  
Party Plaintiffs, :  
-against- :  
INTERNATIONAL TERMINAL OPERATING CO., INC., :  
Third-Party Defendant :  
-----X

STATE OF NEW YORK )  
                      ) ss.:  
COUNTY OF NEW YORK)

VICTOR S. CICHANOWICZ, being duly sworn, deposes  
and says:

I am a member of the firm of CICHANOWICZ & CALLAN,  
attorneys for defendant and third-party plaintiff, CIA DE NAV.  
MAR NETUMAR (NETUMAR) herein, and am fully familiar with the  
pleadings and proceedings heretofore had herein.

This affidavit is submitted in support of the  
within application to have the judgment, interest and costs,  
awarded to plaintiff by this Court and a jury, deposited in  
Court until withdrawn by an appropriate order.

The plaintiff, a longshoreman, sustained an injury to his left foot on November 5, 1970, when it became caught between some pipe which he and other longshoremen in the employ of INTERNATIONAL TERMINAL OPERATING CO., INC. (I.T.O.) were loading and stowing in a pipe bed which had been constructed on the weather deck of the vessel SS MOSQUEIRO (owned by NETUMAR) by marine carpenters in the employ of NEW JERSEY EXPORT MARINE CARPENTERS, INC. (NEW JERSEY EXPORT).

The plaintiff sued both NEW JERSEY EXPORT and NETUMAR.

Both NEW JERSEY EXPORT and NETUMAR impleaded I.T.O.

After trial before this Court and a jury, the case was submitted to the jury on written questions. NEW JERSEY EXPORT was found free of negligence and not to have breached its warranty. NETUMAR was held to have been negligent but the SS MOSQUEIRO was found to be seaworthy. The plaintiff was found free of contributory negligence but I.T.O. was found to have breached its warranty of workmanlike service. NETUMAR however was denied indemnity because the jury found that its conduct precluded indemnity. Damages in the sum of \$42,000.00 were awarded the plaintiff and judgment in accordance with the jury's answers to the questions was entered against NETUMAR on November 9, 1973. A copy of the judgment is annexed hereto as Exhibit "A".

NETUMAR subsequently filed a notice of appeal. The United States Court of Appeals for the Second Circuit affirmed the judgment on December 11, 1974. A copy of that judgment is annexed hereto as Exhibit "B".

Finally, NETUMAR petitioned the United States Supreme Court seeking a writ of certiorari. The petition for a writ of certiorari was denied on April 28, 1975. A copy of the telegram received from the Supreme Court is annexed hereto as Exhibit "C". Upon information and belief, this matter will be remanded to this Court in a very short period of time for final disposition. The purpose of this motion is to avoid prejudice to NETUMAR.

The plaintiff has taxed costs in the United States District Court in the amount of \$327.32 (Exhibit "D").

Costs in the Court of Appeals, that have not been taxed, are claimed in the following amounts:

Plaintiff	-	\$ 320.11
I.T.O.	-	422.12
NEW JERSEY EXPORT	-	322.69

While both I.T.O. and plaintiff allege costs in the United States Supreme Court, they are not entitled to them pursuant to the Rules of that Court.

Interest on a judgment is computed at the rate of 6% per annum pursuant to the appropriate statutes. At that rate, interest on this judgment, according to a letter from plaintiff's attorney, dated April 29, 1975, is \$3,386.20 through April 30, 1975. (Exhibit "E").

The letter, among other things, demands payment of the judgment, interest and costs and agrees to hold NETUMAR harmless from any consequences of payment.

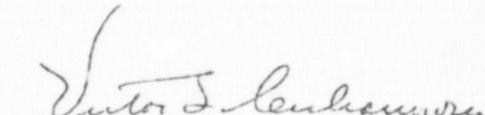
I.T.O., by letter dated May 1, 1975 (Exhibit "F"), advises that they have a lien in the amount of \$6,458.19. They demand that the lien, together with interest and costs, for a total of \$7,827.06, be paid to them before any monies are paid to plaintiff. In the alternative, they demand that the aforesaid total be paid into Court pending resolution of the dispute.

Therefore NETUMAR is in the unenviable position of being required to pay either claimant at its peril. To obviate the situation, the defendant and third-party plaintiff NETUMAR prays for an order allowing it to pay into Court the following

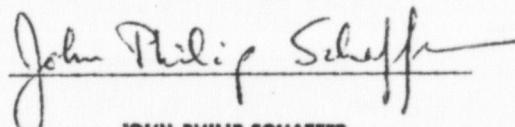
amounts:

Judgment	\$42,000.00
Interest	3,386.20
Claimed costs of I.T.O. and plaintiff	1,069.55
<hr/>	
Total	\$46,455.75

WHEREFORE, it is respectfully prayed that an order be entered herein directing and allowing this defendant and third-party plaintiff to deposit the judgment, interest and costs in the amount of \$46,455.75 into this Court, that the said amount or any parts thereof shall not be withdrawn except by order of the Court on notice to all parties, and for such other and further relief as to the Court may seem just and proper, together with costs, disbursements and attorney's fees for this motion.

  
\_\_\_\_\_  
Victor S. Cichanowicz

Sworn to before me this 5th  
day of May, 1975.



JOHN PHILIP SCHAEFER  
NOTARY PUBLIC, State of New York  
No. 03-8787350  
Qualified in Bronx County  
Term Expires March 30, 1976

Ward, J.

NUMBER 72

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK



JOAQUIM CONCEICAO,

Plaintiff, : 71 Civil 2550(RJW)

-against-

NEW JERSEY EXPORT MARINE CARPENTERS  
INC. AND CIA DE NAV. MAR. NETUMAR,  
Defendants  
and Third-Party Plaintiffs,

# 73,889

-ágainst-

INTERNATIONAL TERMINAL OPERATING CO.,  
INC. : Third-Party Defendant.

MICROFILM  
NOV 9 1973

The issues in the above entitled action having been brought on regularly for trial before the Honorable Robert J. Ward, United States District Judge, and a jury on October 29, 30, November 1, 2 and 5, 1973, and the Court having submitted the attached special verdict to the jury, and the jury having answered the special verdict as indicated thereon, and the jury having returned the special verdict in favor of the plaintiff, it is.

ORDERED, ADJUDGED AND DECREED, that plaintiff, JOAQUIM CONCEICAO, have judgment against the defendant, CIA DE NAV. MAR. NETUMAR, in the amount of \$42,000.00, and it is further  
complaint against the defendant New Jersey Export Mine Carpenters Inc, and that the  
ORDERED, that the third-party Complaint against the third-party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC., be and ~~they~~  
are hereby ~~are~~ dismissed.

ited: New York, N. Y.

November 7, 1973

Raymond F. Burghardt  
Clerk

APPROVED:

Robert J. Ward  
United States District Judge. (C)

EXHIBIT "B"

United States Court of Appeals  
FOR THE  
SECOND CIRCUIT



74-1344

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eleventh day of December one thousand nine hundred and seventy-four.

Present: HON. HAROLD R. MEDINA  
HON. HENRY J. FRIENDLY  
HON. MURRAY I. GURFEIN

## Circuit Judges,

Joaquim Conceicao,  
Plaintiff-Appellee,  
v.  
New Jersey Export Marine Carpenters Inc.,  
and CIA De Nav. Mar Netumar,  
Defendants and Third Party  
Plaintiffs,  
CIA De Nav. Mar Netumar,  
Defendant and Third Party  
Plaintiff-Appellant,  
International Terminal Operating Co., Inc.,  
Third-Party Defendant,

74-1344

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to be taxed against the defendant and third-party plaintiff-appellant Cia De Nav. Mar Netumar.

A. DANIEL FUSARO,  
Clerk  
By Vincent A. Carlucci  
Chief Deputy Clerk

A 23a



# Telegram

YSB036(1005)(1-007007A118003)PD 04/28/75 1004

ICS IPMNAWA WSH

10033 COLLECT NFWASHINGTON DC 04-28 1029A EDT

PMS VICTOR S. CICHANOWICZ

80 BROAD ST

NEWYORK NY 10004

DUPLICATE OF TELEPHONED TELEGRAM

PETITION FOR CERTIORARI CIA DE NAV MAR NETUMAR VERSUS

CONCEICAO DENIED TODAY JUSTICE DOUGLAS TOOK NO PART

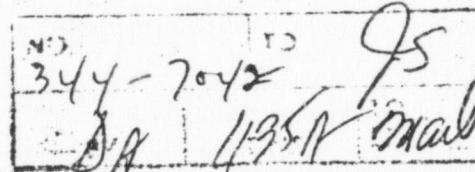
MICHAEL RODAK JR CLERK SUPREME COURT OF UNITED STATES

NNNN

RECEIVED

APR 30 1975

CICHANOWICZ & CALLAN



SF-1201 (RS-69)

EXHIBIT "C"

EXHIBIT "D"

JOAQUIM CONCEICAO,

Plaintiff,

U.S.

NEW JERSEY EXPORT MARINE CARPENTERS, INC., and  
CIA. DE NAV. MAR. NETUMAR, et al,

on Jud # 73,889

CIVIL ACTION FILE NO.

71 Civ. 2550-RJW

JUDGMENT NO. 73-889

Defendants and Third Party Plaintiffs.

Judgment having been entered in the above entitled action on the 9th day of  
November 1973, against Defendant, CIA. DE NAV. MAR. NETUMAR,  
the clerk is requested to tax the following as costs:

## BILL OF COSTS

Fees of the clerk	\$ 15.00
Fees of the marshal	20.90
Fees of the court reporter for all or any part of the transcript necessarily obtained for use in the case	
Fee and disbursements for printing	
Fees for witnesses (itemized on reverse side)	147.92
Fees for exemplification and copies of papers necessarily obtained for use in case	
Docket fees under 28 U. S. C. 1923	20.00
Costs incident to taking of depositions	123.50
Cost as shown on Mandate of Court of Appeals	
Other Costs (Please itemize)	
Total	\$ 327.32

State of NEW JERSEY  
County of HUDSON

: } ss:

I, GEORGE J. DUFFY, do hereby swear that the foregoing costs are correct and were necessarily incurred in this action and that the services for which fees have been charged were actually and necessarily performed. A copy hereof was this day mailed to Cichanowicz & Callan, Esqs., with postage fully prepaid thereon.

Please take notice that I will appear before the Clerk who will tax said costs on  
January 3, 1974 at 10:00 A.M.

Attorney for Plaintiff

*GJ D.J. Duffy*

*No appearance in opposition*  
*Raymond T. Bungford*  
*Clerk*

A 258

Subscribed and sworn to before me this 26th day of December, A. D. 1973,  
at Hoboken, New Jersey

ROSEMARIE FOLEY

NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires Aug. 23, 1976

Costs are hereby taxed in the amount of \$ 327.32 this 3rd day  
of January, 1974, and that amount included in the judgment.

Notary Public.

*Rosemarie Foley*

By *Raymond F. Burghardt*  
Clerk

*Thomas M. Naughton*  
Deputy Clerk

SEE SIDE FOR AUTHORITIES ON TAXING COSTS.

10:20 AM - 1/3/74

A 268

LAW OFFICES  
**BAKER, GARBER, DUFFY & BAKER**  
A PROFESSIONAL CORPORATION  
1 NEWARK STREET  
HOBOKEN, N. J.  
07030  
—  
201-659-2635

NATHAN BAKER  
MILTON GARBER  
GEORGE J. DUFFY  
GERALD H. BAKER

79 WALL STREET  
NEW YORK CITY  
212-227-5748

April 29, 1975

Cichanowicz & Callan, Esqs.  
80 Broad Street  
New York, N.Y. 10004

ATT: Victor S. Cichanowicz, Esq.

Re: Conceicao v. Cia de Nav. Mar.  
Netumar, et al -  
Your File No. 8367/VSC

Dear Mr. Cichanowicz:

On Monday, April 28, 1975, we received a telegram from the Clerk of the Supreme Court, advising that the ship-owner's Petition for Certiorari herein was denied that date.

Accordingly, demand is hereby made upon you to have your client remit funds to us in payment of the Judgment in the amount of \$46,238.32, payable to the joint order of Joaquim Conceicao and this office. Promptly upon receipt of these funds, we will exchange a Satisfaction piece which you may file in the United States District Court for the Southern District of New York.

The amount is computed as follows:

RECEIVED

EXHIBIT "F"

MAY 1 1975

CICHANOWICZ & CALLAN

-2-

Cichanowicz & Callan, Esqs. April 29, 1975

ATT: Victor S. Cichanowicz, Esq.

Judgment	\$42,000.00
Costs in the District Court	327.32
16 months' interest (from 1/1/74 thru 4/30/75) on \$42,327.32 =	3,386.20
Taxed Costs in the Second Circuit	320.11
Taxed Costs in the Supreme Court (see attached receipted bill for printing Brief in Opposition)	204.6
Grand Total	\$46,238.32

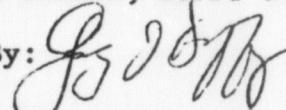
Acceptance of this amount in satisfaction of the Judgment is conditioned upon payment within ten (10) days from the date of this letter. We have already waived the interest days during December, 1973, but any further delay beyond ten (10) days will require a further computation of the interest.

We also undertake to hold the shipowner harmless for any and all claims by I.T.O. for reimbursement of its purported "lien" for compensation expenses in the alleged amount of \$6,458.19. As we have previously notified you and I.T.O., we intend to move before the District Court in opposition to this claim. We will hold that amount, \$6,458.19, in an interest-bearing account, pending determination of the issue as between I.T.O. and plaintiff.

Very truly yours,  
BAKER, GARBER, DUFFY & BAKER

GJD:rmf  
enc.

By:



**A** 281

cc: Alexander, Ash, Schwartz  
& Cohen, Esqs.  
801 Second Avenue  
New York, N.Y. 10017

ATT: Albert V. Testa, Esq.

A 29a

ALEXANDER, ASH, SCHWARTZ & COHEN  
ATTORNEYS AT LAW

EDWARD ASH (1891-1967)  
SIDNEY A. SCHWARTZ  
JOSEPH ARTHUR COHEN  
IRWIN H. HAUT  
ALBERT V. TESTA  
ALLAN JOSEPH LEVINE  
ANTHONY S. SAMMARTANO

801 SECOND AVENUE  
NEW YORK, NEW YORK 10017  
212-682-0410

May 1, 1975

Cichanowicz & Callan, Esqs.,  
80 Broad Street  
New York, N. Y.

RECEIVED

MAY 2 1975

Att: Victor Cichanowicz, Esq.

CICHANOWICZ & CALLAN

Re: Our File: 9834  
Conceicao v. ITO  
Your File: 8367/VSC

Gentlemen:

We have this day received from the Supreme Court of the United States a letter indicating that an order was made on April 28, 1975 denying the shipowner's petition for a writ of certiorari.

Your file will disclose that we have previously advised you by letters of November 8, 1973, December 27, 1974 and February 6, 1975 that ITO has a lien in the amount of \$6,458.19 with interest which must be deducted and paid to ITO before any monies are paid to the plaintiff in satisfaction of the judgment in this case which was entered on November 9, 1973. Candiano v. Moore McCormack Lines, Inc., 402 F 2d 385.

Accordingly, demand is hereby made upon you to have your client remit funds to us in the sum of \$7,827.06 computed as follows:

Lien:

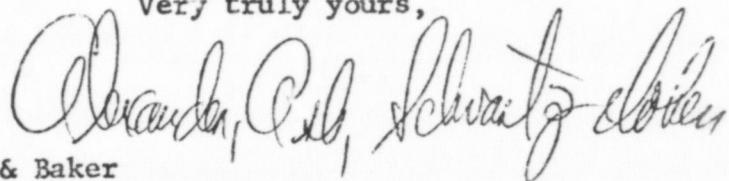
Compensation payments	\$2,430.00
Compensation award	3,228.75
Medical Payments	<u>799.44</u>
Total Lien	\$6,458.19

EXHIBIT "F"

Brought Forward	\$ 6,458.19
Interest from 11/9/73 to 11/8/74	387.49
Interest from 11/9/74 to 5/9/75	193.74
Costs in the Second Circuit	422.12
Costs in the Supreme Court (see attached receipted bill for printing brief in opposition to petition for writ of certiorari)	<u>365.52</u>
<b>TOTAL</b> .....	<b>\$ 7,827.06</b>

Alternatively and in view of plaintiff's attorneys' letter of April 29, 1975 demand is hereby made upon you to deposit the sum of \$7,827.06 with the Clerk of the United States District Court for the Southern District of New York pending the resolution of the dispute with respect to this amount.

Very truly yours,



AVT:ml  
Encl.

CC: Baker, Garber, Duffy & Baker  
Larkin, Wrenn & Comisky  
International Terminal Operating Co. Inc.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-X

JOAQUIM CONCEICAO,

Plaintiff,

71 Civ. 2550 (RJW)

-against-

NEW JERSEY EXPORT MARINE CARPENTERS,  
INC., and CIA DE NAV. MAR. NETUMAR,

AFFIDAVIT IN OPPOSITION  
TO DEFENDANT AND THIRD  
PARTY PLAINTIFF, NETUMAR'S  
MOTION TO DEPOSIT FUNDS,  
AND CROSS-MOTION.

Defendant and  
Third Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING CO.,  
INC.,

Third Party Defendant.

-X

STATE OF NEW JERSEY )  
: SS.:  
COUNTY OF HUDSON )

GEORGE J. DUFFY, being duly sworn, deposes and says:

I am an attorney at law and member of the firm of Baker,  
Garber, Duffy & Baker, attorneys for the plaintiff herein. I  
have handled this case since the outset, was trial counsel, and  
prepared and argued the appeal and opposition to Petition for  
Certiorari. I am familiar with all the proceedings that have  
taken place.

The history of the litigation is set forth on pages one and  
two of the Affidavit of Victor S. Cichanowicz, Esq. in support of

Netumar's Motion herein.

This Affidavit is submitted in opposition to the Motion by Netumar and as a Cross-Motion against third party defendant, International Terminal Operating Co., Inc., to declare invalid any purported claim by it for reimbursement of its compensation expenditures out of the Judgment recovered by plaintiff herein.

\* \* \*

THE MOTION BY NETUMAR

Plaintiff concedes that in accordance with Rule 57 (3) of the Supreme Court Rules, plaintiff's costs for printing the Brief in Opposition to the Petition for Certiorari, which amount to \$204.69, are not a taxable item.

Plaintiff does not concur in defendant's computation of interest at \$3,386.20. That amount was on the basis of compromise in exchange for immediate payment, the terms of which were set forth in our letter of April 29, 1975, Exhibit "E" on Netumar's Motion.

The amount due on the Judgment is as follows:

Judgment	\$42,000.00
Costs in the District Court	327.32
Interest on \$42,000.00 at 6% from 11/7/73 to 1/7/74	420.00
Interest on \$42,327.32 at 6% from 1/7/74-5/7/75	3,392.00
Interest on \$42,327.32 at 6% from 5/8/75-5/20/75	84.00
Taxed costs in the Second Circuit	320.11
	<hr/>
	\$46,543.43

It is respectfully submitted that pending the Court's resolution of the disputed International Terminal Operating Co.'s claim against the Judgment, the entire Judgment need not be deposited in Court, but only that portion of the Judgment that represents the amount of the claim by International Terminal Operating Co., Inc. The balance should be ordered paid forthwith to the plaintiff.

\* \* \*

THE AMOUNT OF THE CLAIM OF  
INTERNATIONAL TERMINAL  
OPERATING CO., INC.

Plaintiff disputes the amount of International Terminal Operating Co.'s claim for reimbursement for medical expenses. The only amount which would be reimbursable would be expenses paid by International Terminal Operating Co. for medical treatment for plaintiff. This amount is \$597.09. The total claimed by International Terminal Operating Co. of \$799.14 includes medical evaluation examination costs expended by International Terminal Operating Co. in defending the compensation claim and would in no event be recoverable.

Plaintiff concedes that in the event International Terminal Operating Co. is allowed reimbursement, it would be entitled to interest on its claim.

Plaintiff, therefore, computes International Terminal Operating Co.'s claim as follows:

A 348

Compensation Payments	\$2,430.00
Compensation Award	3,228.75
Medical Expenses	597.09
	<hr/>
	\$6,255.84

Interest at 6% -	
11/7/73-11/7/74	375.35
Interest at 6% -	187.68
11/8/74-5/7/75	
Interest at 6% -	8.32
5/8/75-5/20/75	
	<hr/>
	\$6,827.19

Costs to International Terminal Operating Co. claimed in the amount of \$422.12 are payable direct to International Terminal Operating Co. by Netumar and are not recoverable out of plaintiff's Judgment.

It is therefore respectfully submitted that only \$6,827.19 need be deposited in the Court pending the disposition by the Court of International Terminal Operating Co.'s disputed claim, and the balance due plaintiff - \$46,543.43 minus \$6,827.19 = \$39,716.24 - should be ordered paid forthwith to plaintiff.

\* \* \*

CROSS-MOTION TO DECLARE INVALID THE CLAIM OF INTERNATIONAL TERMINAL OPERATING CO., INC.

International Terminal Operating Co., Inc. claims that it should be reimbursed out of the Judgment for its expenditures made in connection with plaintiff's compensation claim under the

U. S. Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901 et seq. There is no statutory basis for this claim, since no Formal Award was entered in the compensation case, and the provisions of 33 U.S.C. 933(b) therefore did not come into operation.

Rather, International Terminal Operating Co.'s claim arises under the equitable doctrine of subrogation where "...one...pays money on account of a legal obligation resting upon him for the imposition whereof another is held pecuniarily responsible."

(The Etna, 138 F.2d 37, CCA 3d, 1943)

But one who seeks equity must do equity.

Here, International Terminal Operating Co. has not acted equitably, nor does International Terminal Operating Co. have "clear hands" because:

1. During the course of trial, it actively opposed, and vigorously attempted to defeat plaintiff's right to recover.
2. International Terminal Operating Co. was adjudged by the jury to have been at fault in causing plaintiff's injury, even though the jury found Netumar's conduct such as would preclude it from recovering indemnity from International Terminal Operating Co.

Thus, if International Terminal Operating Co. attempted to recover for its own account against the defendant Netumar, it would be barred by its own causative fault in bringing about the injuries. But, nevertheless, International Terminal Operating Co. now seeks the same result by assuming the cloak of plaintiff's

own innocence and absence of fault.

In order to succeed in its claim for equitable reimbursement, International Terminal Operating Co.'s equity to the funds would have to be of an higher order, or superior to, plaintiff's equitable interest in the fund. This can not be the case where International Terminal Operating Co. has been found responsible for the injuries and plaintiff was found to be free from fault. To reimburse International Terminal Operating Co. under the facts of this case, where the merits have been adjudicated against it, would serve to completely exonerate International Terminal Operating Co. from any financial responsibility for the injuries it caused. This result would work injustice to the plaintiff who in no way contributed to the injuries.

WHEREFORE, I respectfully urge the Court to order that payment in full be made on the Judgment by the defendant forthwith to the plaintiff; and that the Court further adjudge and decree that third party defendant, International Terminal Operating Co., Inc., is not entitled to any claim or reimbursement for its expenditures in compensation from the plaintiff on the Judgment monies; and that the Court otherwise rule and direct as the interests of justice and equity may require.

Sworn to before me this )  
16th day of May, 1975. )

*GE 9-17-77*  
GEORGE J. DUFFY

*TOMICA M. MAJOR*  
NOTARY PUBLIC OF NEW JERSEY

TOMICA M. MAJOR  
A NOTARY PUBLIC OF NEW JERSEY  
My Commission Expires Sept. 28, 1977

9834-T  
AVT:HK

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

X

JOAQUIM CONCEICAO,

Plaintiff,

-against-

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,  
and CIA DE NAV. MAR. NETUMAR,

Defendants and Third-  
Party Plaintiffs,

71 Civil 2550 (RJW)

-against-

INTERNATIONAL TERMINAL OPERATING CO.,  
INC.,

Third-Party Defendant.

X

THIRD-PARTY DEFENDANT'S MEMORANDUM  
OF LAW IN OPPOSITION TO THE DEFEND-  
ANT'S MOTION AND THE PLAINTIFF'S  
CROSS-MOTION.

Statement

After a trial before the Honorable Robert J. Ward and a jury from October 29, 1973 to November 5, 1973 the jury returned a verdict in favor of the plaintiff in the sum of \$42,000. In answering special questions the jury found that the defendant-shipowner was negligent but its vessel was not unseaworthy. The jury further found that the plaintiff was free of

any contributory negligence. As to the third party complaint although the jury found that INTERNATIONAL TERMINAL OPERATING CO., INC. had breached its warranty of workmanlike performance of the stevedoring operation the jury also found that the defendant-shipowner was precluded by its conduct from recovering indemnity. The United States Court of Appeals for the Second Circuit affirmed the judgment entered on this jury verdict and the shipowner's petition for certiorari to the United States Supreme Court was denied.

Thereafter a dispute arose with regard to the stevedore's lien for compensation payments and medical expenses and shipowner's counsel has moved for an order pursuant to Rule 67 of the Federal Rules of Civil Procedure pending resolution of this dispute. Originally the shipowner sought to deposit the entire amount of the judgment with interest with the Court, to wit, \$46,455.75 but has since paid to the plaintiff the sum of \$39,623.6 and is presently holding the balance of \$6,827.19 representing the stevedore's lien. It is the contention of the third party defendant that it is entitled to repayment of these monies out of the judgment recovered by plaintiff.

POINT I

THIRD PARTY DEFENDANT IS  
ENTITLED BY STATUTE TO RECOVER  
THE AMOUNTS PAID TO THE PLAINTIFF  
FOR COMPENSATION AND MEDICAL EX-  
PENSES OUT OF THE JUDGMENT RECOVERED  
BY THE PLAINTIFF IN THIS CASE.

Third party defendant's claim to recover the monies paid to the plaintiff for compensation and medical expenses arises under the Longshoremen's & Harbor Workers' Compensation Act, 33 USCA § 933, subdivisions (E)(H). In Landon v. Lief Hoegh & Co., Inc., U.S. Court of Appeals Second Circuit, Docket Number 74-2304, decided June 18, 1975, the Court held

that § 33 USCA 933 has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injury and that this section suffices to permit it to recover the full amount of the compensation paid out of plaintiff's larger recovery.

The Court further held in the Landon case that a reduction of the shipowner's liability to the plaintiff by the amount of the compensation payments would be the equivalent of a contribution by the employer which the Supreme Court declined to require in Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp., 342 U.S. 282 and citing the Supreme Court decision in Pope & Talbot v. Hawne, 346 U.S. 406.

The Court in Landon went on to say that the rule still remains that the shipowner may not deduct the compensation payments from the plaintiff's recovery but must pay them to the employer under §33. Furthermore, the Court indicated that compensation payment recoupment may not be defeated on the theory of concurrent negligence in any event.

Concededly Landon was decided after the 1972 amendments to the Longshoremen's & Harbor Workers' Act. However, these amendments did not affect the employer's right to recover compensation payments made pursuant to the Act. In The Etna, 138 F. 2d 37 (CCA 3rd 1943) it was held that the employer was entitled to reimbursement for monies paid in the nature of compensation even where the monies were paid without an award and that the employer's right to reimbursement out of the employee's recovery from a third person was based upon the Longshoremen's & Harbor Workers' Compensation Act as it read at that time.

In The Etna case, supra, the Court said at pages 40 and 41:

"But Sec. 33 (a) does not provide that the employee shall have a right to both compensation from his employer and damages from responsible third persons. This, it seems to us, is an implicit recognition that the employer has a right to reimbursement for his outlay under the

Compensation Act out of his employee's adequate recovery from a third person in all cases regardless of whether the employer has become the assignee of the employee's right of action against a third person by paying compensation 'under an award' or has paid the compensation 'without an award' - a procedure which the Act expressly directs employers to follow."

\* \* \* \*

"We find no intent indicated by the Act to take away from the employer who pays compensation without an award his right to reimbursement out of his employee's recovery from third persons. On the contrary, we think that the intent and scheme of the Act requires that the employer's right to subrogation for compensation payments made in the circumstances here shown be recognized wholly apart from and without regard for the assignment provided for in Sec. 33(b) of the Act. It is only the right of control of the employee's right of action against third persons which an employer foregoes by paying compensation without an award. His right to reimbursement out of the recovery for the employee's injury remains unaffected."

In Fontana v. Pennsylvania Railroad Company, 106 F. Supp. 461, aff'd. 205 F. 2d 151 (1952) Judge Weinfeld reviewed the authorities and, citing Etna, held that the employer's right to recovery of compensation payments was based upon the Longshoremen's & Harbor Workers' Compensation Act and was not affected if the payments were made without an award. In the Fontana case the Court said that the entire

scheme of the Act negates any theory that the injured employee is entitled to both compensation from his employer and damages from third parties.

In Pope & Talbot, Inc. v. Hawn, 74 S. Ct.

202, 346 U.S. 406, the Supreme Court said at Page 412:

"Consequently Pope & Talbot says that if Hawn keeps the money he will have a double recovery and that to allow him to repay Haenn would give an unconscionable reward to an employer whose negligence contributed to the injury. A weakness in this ingenious argument is that §33 of the Act has specific provisions to permit an employer to recoup his compensation payments out of any recovery from a third person negligently causing such injuries. Pope & Talbot's contention if accepted would frustrate this purpose to protect employers who are subjected to absolute liability by the Act. Moreover, reduction of Pope & Talbot's liability at the expense of Haenn would be the substantial equivalent of contribution which we declined to require in the Halcyon case."

See also Hugev v. Damps. International, 170 F. Supp. 601, aff'd. 274 F. 2d 875, wherein it was held that the employer having paid benefits under the Act without an award was entitled to reimbursement out of the employee's recovery from a third person.

It is also significant that in Pope & Talbot, Inc. v. Hawn, supra, the employee was paid compensation payments without a

formal award. Plaintiff's contention that there is no statutory basis for the employer's claim since no formal award was made is therefore without merit. See also Ruggiero v. Liberty Mutual Insurance Company, 298 N.Y. 775; International Terminal Operating Co., Inc. v. Miller, 208 N.Y.S. 2d 813, 28 Misc. 2d 445.

It is thus clear that the employer, in this case INTERNATIONAL TERMINAL OPERATING CO., INC., is entitled by statute to recover the monies paid to the plaintiff by way of compensation and for medical expenses. This is and was the intention of the Longshoremen's & Harbor Workers' Compensation Act. It was never intended that an injured employee be entitled to both workmen's compensation benefits and damages in a third party action. This would not only constitute a double recovery but would result in an unjust enrichment of the plaintiff. The employer's right to reimbursement for compensation payments out of a third party recovery arose when the Longshoremen's & Harbor Workers' Act was originally enacted and has not been changed by the 1972 amendments thereto nor is it affected if these payments are made without an award.

POINT II

THE DEFENDANT-SHIPOWNER HAS NO STANDING IN THIS DISPUTE AND IS NOT ENTITLED TO ANY CREDIT AGAINST THE JUDGMENT OBTAINED BY THE PLAINTIFF.

The jury verdict in this case has fixed the liabilities as between the plaintiff and the defendant-shipowner and also as between the defendant-shipowner and the third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC. By virtue of this jury verdict and the judgment entered thereon it has been determined that the defendant-shipowner was precluded from recovering indemnity from INTERNATIONAL TERMINAL OPERATING CO. INC. because it was guilty of conduct precluding indemnity. The Court of Appeals in affirming this judgment found that there was ample proof in the record of conduct on the part of the shipowner precluding indemnity and the Supreme Court has denied certiorari.

Despite the fact that the shipowner was denied indemnity after a trial on the merits and despite the fact that it has exhausted its remedies on appeal, it is now seeking contribution from the stevedore by claiming to be entitled to a "Murray Credit" for the amount of the compensation lien against the plaintiff's judgment. The so-called "Murray Credit" theory arising from the decisions in Murray v. United

States, 405 F. 2d 1361, and the subsequent decisions in Dawson v. Contractors Transport Corp., 467 F. 2d 727 and Martello v. Hawley, 300 F. 2d 721, has been rejected in Admiralty matters since they are not admiralty cases and do not apply to the problem at hand. Lucas v. "Brinknes" Schiffahrts Ges., 379 F. Supp. 759. The theory of a "Murray Credit" is based upon an alleged right to contribution between joint tortfeasors. However, even Murray held that there could not be any right of contribution unless there was joint liability of both parties to the injured person.

In American Mutual Liability Insurance Company v. Matthews, 182 F. 2d 322, (2d Cir. 1950), it was held that for a right of contribution to exist between tortfeasors they must be joint wrongdoers in the sense that their tort or torts imposed a common liability upon them to the party injured. Since there was no common liability between the employer, INTERNATIONAL TERMINAL OPERATING CO., INC., and the third party defendant-shipowner to the plaintiff they were not joint tortfeasors and no contribution can be exacted from the employer.

In Cooper Stevedoring Co., Inc. v. Kopke, 94 S. Ct. 2174, (1974), the Supreme Court held that although

there could be contribution between joint tortfeasors there could be no contribution if one of the tortfeasors was the employer whose liability was limited by statute. The holding in the Supreme Court in the Cooper case merely indicates that there can be contribution between joint tortfeasors as long as the employer is not involved but did not change the decision in Halcyon v Haenn Ship Ceiling & Fitting Corporation, 342 U.S. 282. A shipowner still may not obtain contribution from the employer in a third party action by the employee. The Supreme Court in the Cooper case did not discuss the question of whether the employer was entitled to reimbursement for compensation payments regardless of whether it was a tortfeasor or not. In any event, the shipowner and the stevedore in the case at bar were not joint tortfeasors and the contribution sought by the shipowner from the stevedore is barred by the holding in the Cooper case as well as under the so-called "Murray Credit" theory. See also Turner v. Excavation Construction Inc., 324 F. Supp. 704.

CONCLUSION

It is respectfully submitted that the shipowner should be directed to pay to the stevedore the sum of \$6,827.19 representing the amounts paid to the plaintiff for compensation benefits and medical expenses.

Respectfully submitted,

ALEXANDER, ASH, SCHWARTZ & COHEN  
Attorneys for Third-Party  
Defendant, INTERNATIONAL TERMINAL  
OPERATING CO., INC.  
801 Second Avenue  
New York, New York 10017

ALBERT V. TESTA  
Of Counsel

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----x

JOAQUIM CONCEICAO,

Plaintiff,

71 Civ. 2550  
R.J.W.

-against-

NEW JERSEY E.I. & I. MARINE CARPENTERS,  
INC. and CIA DE NAV. MAR. NETUMAR,

Defendants and Third  
Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING  
CO., INC.,

Third Party Defendant.

-----x

Defendant and third party plaintiff Cia de  
Nav. Mar. Netumar ("Netumar") moves for an order pursuant  
to Rule 67, Fed. R. Civ. P., directing the deposit with the  
Court of a portion of a judgment and costs rendered against  
it. Plaintiff Joaquim Conceicao ("Conceicao") cross-moves  
for a declaration of the invalidity of the claim of third  
party defendant International Terminal Operating Co., Inc.  
("ITO") for reimbursement of its compensation payments to  
plaintiff out of the latter's recovery. For the reasons  
hereinafter stated, Netumar's motion is granted and Conceicao's  
cross-motion is denied.

The present controversy stems from an injury sustained by Conceicao on November 5, 1970 while employed by ITO and engaged in loading on board a Netumar owned vessel.

A jury awarded plaintiff \$42,000 and found defendant shipowner had been negligent but that its ship was not unseaworthy. The jury also determined that Conceicao had not been contributorily negligent and that ITO had breached its warranty of workmanlike service. The stevedore, however, was not compelled to indemnify the shipowner, the jury finding that the shipowner's conduct barred recovery.

Rule 67, Fed. R. Civ. P., under which defendant moves, provides as follows:

In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party, upon notice to every other party, and by leave of court, may deposit with the court all or any part of such sum or thing. Money paid into court under this rule shall be deposited and withdrawn in accordance with the provisions of Title 28, U.S.C. §§2041, and 2042; the Act of June 25, 1934, c. 756, §23, as amended (48 Stat. 1236, 58 Stat. 845), U.S.C., Title 31, §725v; or any like statute.

Netumar has paid to plaintiff the judgment recovered at trial with the exception of \$6,827.19, the stevedore's lien for compensation payments and medical expenses. The disposition of this sum is the subject of the present controversy.

The stevedore claims it is entitled to full payment of its lien. The shipowner disputes this, asserting that it is due a credit for this sum against plaintiff's recovery. Conceicao counters, demanding the full award be remitted to him without any deductions.

It is settled law that the stevedore employer may recover its compensation payments from the longshoreman's judgment award. The United States Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. §901 et seq. explicitly provides for the order of distribution when an employer sues on behalf of a longshoreman. Although there is no express statutory provision covering instances when the worker himself brings suit, the stevedore's right to recoup has long been recognized by the courts. The Etna, 138 F.2d 37 (3d Cir. 1943).

This principle was recently reiterated in Landon v. Lief Hoegh & Co., Docket No. 74-2304 (2d Cir. June 18, 1975). The court stated that, "[t]he rule still remains that the shipowner may not deduct the compensation payments from the plaintiff's recovery but must pay them to the employer under section 33 of the Act;" (slip. op. at 4199) and "the compensation payment recoupment may not be defeated on the theory of concurrent negligence, in any event;" (slip op. at 4200 n.3). Consequently, of the three claims presented to the Court, only ITO's has merit.

The second matter to be determined is also not an open question in this Circuit. Plaintiff has requested that his attorneys' fees be apportioned and a part be deducted from ITO's claim. The guiding authority on this issue is Fontana v. Pennsylvania Co., 106 F. Supp. 461 (S.D.N.Y. 1952), aff'd, 205 F.2d 151 (2d Cir.), cert. denied sub nom., Fontana v. Huron Stevedoring Corp., 346 U.S. 886 (1953). In Fontana, Judge Weinfeld held that the employer must recover "its compensation and medical expense payments, without deduction for attorneys' fees or other litigation costs." 106 F. Supp. at 464. See also, Scozzari v. Jade Co., Inc., 350 F. Supp. 801, 805 (E.D.N.Y. 1972).

Recent opinions in other circuits are inapposite to the facts of this case. Plaintiff's reliance upon Chouest v. A & P Boat Rentals, Inc., 472 F.2d 1026 (5th Cir.), cert. denied sub nom., Travelers' Ins. Co. v. Chouest, 412 U.S. 949 (1973) is misplaced. Characterizing the situation before it as "unusual," the court in Chouest remarked that, "the question of reallocation will never even arise in the majority of cases, where the amount of recovery is sufficient both to reimburse the [employer] and pay the plaintiff's attorney." 472 F.2d at 1037.

Similarly unconvincing in the instant controversy is Swift v. Bolten, 517 F.2d 368 (4th Cir. 1975). That case

reflects the 1972 amendments to the Compensation Act which abolished the right of indemnity on the part of the ship against the stevedore. 33 U.S.C. §905(b). In Swift, the employer's insurance carrier, no longer threatened by an obligation to hold the vessel owner harmless, remained on the sidelines throughout the litigation and later sought to recoup its compensation payments from the plaintiff's recovery. The court reasoned:

After all, had the longshoreman not filed the action, the insurance carrier would have been forced to file an action to recover of the shipowner for its payments and would have incurred attorney's fees payable out of its recovery. It suffers no injury if it is forced, as we hold, to bear its proportionate share of the attorney's fees when the longshoreman files the action and makes full recovery on its behalf.

Swift v. Bolten, supra at 370. Here, in a pre-1972 accident case, ITO did become involved in the suit and did incur its own attorney's fees. Therefore, the logic of Swift does not apply.

Accordingly, the employer, ITO, is entitled to reimbursement of its compensation payments from the plaintiff's recovery. Conceicao's cross-motion, asking that ITO's claim be declared invalid, is consequently denied. Netumar's motion for an order directing the deposit with the Court of that portion of the judgment which it still retains, is granted.

Settle order on notice.

Dated: October 10, 1975

*Robert J. Conrad*  
U. S. D. J.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x  
JOAQUIM CONCEICAO,

US District Court  
Filed  
OCT 28, 1975  
SD of NY

Plaintiff,

71 Civ. 2550  
(RJW)

-against-

NEW JERSEY EXPORT MARINE CARPENTERS,  
INC., and CIA DE NAV. MAR. NETUMAR,

ORDER

Defendants and Third-  
Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING CO.,  
INC.,

Third-Party Defendant.

----- x

Upon the motion of third party plaintiff, CIA DE NAV.  
MAR. NETUMAR, for an order directing the deposit of a portion  
of a judgment and costs rendered against it, and the cross-  
motion of the plaintiff for a declaration of the invalidity of  
the claim of third party defendant to the said funds sought to  
be deposited, it is hereby

ORDERED, that the motion be, and the same hereby is,  
granted, and it is further

ORDERED, that the cross-motion be, and the same  
hereby is, denied, and it is further

ORDERED, that the said third party plaintiff deposit into the registry of this Court within five (5) days after service upon it of a copy of this order with notice of its entry, the sum of \$6,827.19, and it is further

ORDERED, that said funds may be paid to ALEXANDER, ASH, SCHWARTZ & COHEN, as attorneys for third party defendant, upon application to this Court without the necessity of notice to the other parties herein or their attorneys.

Robert J. Ward

Robert J. Ward,  
U. S. D. J.

DATED, New York, New York,  
October 28, 1975.

FILED

U.S. District Court

Nov. 5 1123 AM '75  
S.D. of N.Y.

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

JOAQUIM CONCEICAO,

Plaintiff,

-against-

71 Civ. 2550 (RJW)

NEW JERSEY EXPORT MARINE CARPENTERS,  
INC., and CIA DE NAV. MAR. NETUMAR,

NOTICE OF APPEAL

Defendants and  
Third Party Plaintiffs,

-against-

INTERNATIONAL TERMINAL OPERATING CO.,  
INC.,

Third Party Defendant.

-X

PLEASE TAKE NOTICE that plaintiff hereby appeals to the  
United States Court of Appeals for the Second Circuit from the  
final Order after judgment entered herein by the Honorable Robert  
J. Ward on October 28, 1975, denying the Cross-Motion of the  
plaintiff for a declaration of the invalidity of the claim of  
third party defendant, INTERNATIONAL TERMINAL OPERATING CO., INC.,  
to funds in the amount of \$6,827.19 to be deposited with the Court.

Dated: November 3, 1975.

BAKER, GARBER, DUFFY & BAKER,  
A Professional Corporation,  
Attorneys for Plaintiff

By: George J. Duffy

GEORGE J. DUFFY

Office & P.O. Address

1 Newark Street  
Hoboken, New Jersey 07030

-and-

c/o Helweil and Crispino, Esqs.  
79 Wall Street  
New York, New York 10005  
(212) 227-5748

TO: CLERK  
United States District Court  
Southern District of New York

ALEXANDER, ASH, SCHWARTZ & COHEN, ESQS.,  
Attorneys for Third Party Defendant,  
INTERNATIONAL TERMINAL OPERATING CO., INC.,  
801 Second Avenue  
New York, New York 10017

CICHANOWICZ & CALLAN, ESQS.,  
Attorneys for Defendant and  
Third Party Plaintiff,  
CIA DE NAV. MAR. NETUMAR,  
80 Broad Street  
New York, New York 10004

LARKIN, WRENN & CUMISKY, ESQS.,  
Attorneys for Defendant and  
Third Party Plaintiff,  
NEW JERSEY EXPORT MARINE CARPENTERS, INC.,  
11 Park Place  
New York, New York 10007

BRIEF AND APPENDIX FOR PLAINTIFF-Appellant

JOAQUIM CONCEICAO

75-7634

JOAQUIM CONCEICAO,

Plaintiff-Appellant,

vs.

NEW JERSEY EXPORT MARINE CARPENTERS, INC.,

Defendant 3rd Party Appellee

and

CIA DE NAV. MAR NETUMAR,

3rd Party Defendant-Appellee

vs.

INTERNATIONAL TERMINAL OPERATING, CO., INC.,

3rd Party Defendant-Appellee.

AFFIDAVIT  
OF MAILING

STATE OF NEW YORK,

COUNTY OF NEW YORK,

} ss:

Richard Franks

being duly sworn, deposes and says: that he is over twenty-one years of age; that on the .... 20th .... day of .... JANUARY ...., 1976.... he served the annexed brief and appendix for Plaintiff-Appellant..... by depositing on said 20th .... day of January ...., 1976. 2 true copies of said brief and appendix

Plaintiff-Appellant....., duly enclosed in a postpaid and sealed wrapper, certified mail, return receipt requested, in an official post office duly maintained and operated by the Government of the United States at Church Street....., Borough of Manhattan, New York City, and addressed to:

Alexander Ash, Schwartz & Cohen, Esqs,  
.....801 Second Avenue, New York, New York 10017..

Cichanowicz & Callan, Esqs  
..... 80 Broad Street, New York, New York 10004

Larkin, Wreim & Cumisky, Esqs  
..... 11 Park Place, New York, New York 10007.....

.....  
that being the address within that State designated by them on the previous papers in this action as the place where they then kept an office for the regular transaction of business, between which places there then was and now is regular communication by mail.

*Richard Franks*

Sworn to before me this 20th.....  
day of .... January ...., 1976 ..

*Edith G. Zweig*

EDITH G. ZWEIG  
NOTARY PUBLIC, State of New York  
No. 31-9815600  
Qualified in New York County  
Commission Expires March 30, 1976